SUPREME COURT, U. S.

FILED

OCT 2 1973

MICHAEL RODAK, JR., CLERK

No. 73-266

In the Supreme Court of the United States

OCTOBER TERM, 1973

STEPHEN J. BORYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
IRVING JAFFE,
Acting Assistant Attorney General,
ROBERT E. KOPP,
ANTHONY J. STEINMEYER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-266

STEPHEN J. BORYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A1-A17) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 11, 1973. The petition for a writ of certiorari was filed on August 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether petitioner, a former Army officer, is entitled to military pay for the period of his active duty during which he was incarcerated by civilian authorities on serious criminal charges.

2. Whether petitioner is eligible for retirement benefits when, to attain the necessary 20 years of active service, he must include the periods of his confinement

by civilian and military law-enforcement authorities on account of his criminal misconduct.

STATEMENT

According to the agreed statement of facts (Pet. 3-7), petitioner enlisted in the Army on March 21, 1949, and was commissioned as a second lieutenant on September 23, 1949. On June 25, 1963, while on leave, petitioner was arrested by civilian police in Georgia and later transferred to civilian authorities in South Carolina, where he was twice tried and acquitted by a state court. Upon his release from civilian confinement on June 19, 1964, petitioner was returned to military control. On June 22, 1964, he was restricted to certain areas of his Army post pending an investigation under Article 32 of the Uniform Code of Military Justice, 10 U.S.C. 832, which led to a general court-martial. Some but not all of the offenses under investigation were the same as those charged against petitioner by the civilian authorities (Pet. App. A8).

On January 23, 1965, petitioner was convicted by court-martial of two rapes, one attempted rape, three robberies, five sodomies, one attempted sodomy, and one larceny.[1] He was sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement at hard labor for 60 years (Pet. 5). The conviction was set aside by the Army's Board of Review. Following a second court-martial, petitioner was again convicted on August 2, 1966, of the same offenses

---

[1] Def.'s Exh. 1-D, appended to Defendant's Reply to Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment, filed in the court below. Petitioner's offenses are described in more detail in the opinion of the court below (Pet. App. A7-A8).

except for the larceny charge,[2] and was given the same sentence as before. The Army Board of Review affirmed this conviction but reduced the confinement to 30 years' hard labor (Pet. 5).

On September 5, 1969, the United States Court of Military Appeals reversed petitioner's conviction. *United States* v. *Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259. That court held that *O'Callahan* v. *Parker*, 395 U.S. 258, required dismissal of all military charges against petitioner because his "horrible acts" and "vicious and depraved conduct" (18 U.S.C.M.A. at 549, 40 C.M.R. at 261) had not been service-connected. Petitioner was released from military confinement and returned to active duty on September 22, 1969 (Pet. 5-6).

On October 1, 1969, petitioner was honorably discharged from the Army pursuant to 10 U.S.C. 3303, which requires the retirement or discharge of any officer who has been twice passed over for promotion to certain ranks. Petitioner had been passed over for promotion to major in 1963 and again in 1964 (Pet. 3, 4). For this reason, he had been notified in July 1964 that he was to be honorably discharged on January 1, 1965, but had been retained in the service pursuant to 10 U.S.C. 803, because of the court-martial charges then pending against him (Pet. 5).

Upon petitioner's discharge, the Army computed his active service for retirement purposes as follows (Pet. 6):

---

[2] See Def.'s Exh. 1-B, appended to the Reply Memorandum cited in note 1, *supra*.

	Years	*Months*	*Days*
Net Service This Period	15	3	19
Other Service	4	8	21
Total	20	0	10
Total Active Service	15	3	19

Petitioner objected to this computation and sought retirement benefits based upon service of 20 years, 10 days. He also sought military pay and allowances for the period of his civilian confinement, together with other relief not pursued in this Court (Pet. App. A1).

After the Army Board for the Correction of Military Records denied relief (Pet. 7), petitioner brought this action in the Court of Claims. The court granted summary judgment for the government. It first held that the period of petitioner's civilian confinement could not be credited for either pay or retirement purposes (Pet. App. A3-A11). Then, although finding it unnecessary to reach the issue, the court also reasoned that petitioner was precluded from obtaining retirement credit for his period of military confinement (Pet. App. A11-A12).

ARGUMENT

The decision of the Court of Claims is correct, and there is no reason for further review.

1. Petitioner is not entitled to military pay for the period of his civilian confinement, because his absence from duty was not excused as unavoidable. Pursuant to 37 U.S.C. 503, a "member of the Army * * * who is absent without leave or over leave, forfeits all pay and allowances for the period of that absence, unless it is excused as unavoidable." The applicable regulation, AR 37-104, § 12122 (Pet. App. A5), provides that "regardless of the outcome of the civil proceedings," an absence because of civilian confinement is not necessarily

unavoidable. This regulation is in accord with the Comptroller General's ruling that "the basis for excusing absences should be an absence of misconduct rather than a lack of criminal culpability" (39 Comp. Gen. 781, 783). Under this criterion, the Army determined that petitioner's absence was not unavoidable because it was due to his own misconduct (Pet. 7). The Court of Claims correctly held that on the facts of this case that determination was not arbitrary or capricious, and was supported by substantial evidence (Pet. App. A8).

2. Petitioner's claim for retirement benefits also lacks merit. Eligibility for such benefits requires at least 20 years of service (10 U.S.C. 3911). Years of service include "all active service performed as a member of the Army" (10 U.S.C. 3926). The total time between petitioner's enlistment (March 21, 1949) and discharge (October 1, 1969) was 20 years, 6 months, and 10 days.[3] Of this period, petitioner was in civilian confinement for 11 months, 24 days (June 25, 1963, to June 19, 1964) and in military confinement for 5 years, 3 months (June 22, 1964, to September 22, 1969). Thus, if either period of confinement is excluded, petitioner's creditable service is reduced to less than the necessary 20 years.

The Court of Claims correctly concluded that both periods of confinement must be excluded in determining eligibility for retirement benefits. During his civilian confinement, petitioner performed no military duties and, as discussed above, is entitled to no military pay,

---

[3] The record does not indicate why 6 months of this total time was disregarded in arriving at the figure 20 years, 10 days, for petitioner's "total active service" (Pet. 6). Petitioner, in any event, only claims 20 years, 10 days of service (see Pet. 6-7).

because his absence from duty was not excused. Although a decision of the Comptroller General authorizes retirement credit for the period that an officer is in civilian confinement, 38 Comp. Gen. 352, that decision is contrary to the purpose of 37 U.S.C. 503 (quoted *supra*, p. 4) and makes an indefensible distinction between officers and enlisted men (see Judge Davis's concurring opinion, Pet. App. A15).[4] Accordingly, petitioner's period of civilian confinement must be excluded in determining his eligibility for retirement benefits.[5]

Similarly, petitioner's period of military confinement was properly excluded for retirement purposes. As the Court of Claims noted (Pet. App. A11), petitioner did not perform service in the active military service during this period. The Court of Military Appeals clearly

---

[4] Apparently, at least part of petitioner's civilian confinement was included in the 15 years, 3 months, and 19 days of net service which the Army credited to petitioner for retirement purposes. The period of 4 years, 8 months, and 21 days of "other service" which the Army excluded for retirement purposes corresponds to the period between petitioner's originally specified mandatory discharge date (January 1, 1965) and his release from military confinement (September 22, 1969) (see Pet. 7; but see Pet. App. A16). Thus, although the agreed statement of facts provides that "[t]he Army designated 4 years, 8 months and 21 days of plaintiff's civilian and military confinement as 'other service' and excluded same from the computation of total service creditable to plaintiff" (Pet. 6), in fact, the "other service" was apparently the period of petitioner's military confinement subsequent to the date which, but for the pending court-martial charges, he would have been discharged for having been twice passed over for promotion.

[5] Petitioner also contends (Pet. 15) that AR 37-104, § 10106, requires that his civilian confinement be credited for retirement purposes. The Court of Claims correctly observed (Pet. App. A9, A15), however, that this provision pertains only to basic pay, not retirement pay.

indicated that its reversal of petitioner's conviction was not based upon any doubts as to the correctness of the court-matial's findings of guilt. No purpose of the retirement benefits program, therefore, could be fostered by awarding creditable service for petitioner's period of military confinement.

Moreover, the Army properly determined that the portion of this confinement after January 1, 1965, could not be included in any event. But for the court-martial charges then pending against petitioner, he would have been discharged no later than that date pursuant to the mandatory provisions of 10 U.S.C. 3303 because he had twice been passed over for promotion. It is settled that service beyond a serviceman's mandatory release date cannot be credited for retirement purposes. *Richard* v. *United States,* 152 F. Supp. 433 (Ct. Cl.); 43 Comp. Gen. 742; 41 Comp. Gen. 375. Cf. *O'Callahan* v. *United States,* 451 F. 2d 1390 (Ct. Cl.).[6]

---

[6] *Bell* v. *United States,* 366 U.S. 393, relied upon by petitioner (Pet. 8-10), is not in point. There, enlisted men were held to be entitled to pay and allowances during the period that they were prisoners of war in North Korea despite their collaboration with the enemy. The controlling statute in *Bell* was 37 U.S.C. (1958 ed.) 242, which required that any serviceman captured by the enemy be accorded "the same pay, subsistence, and allowance to which he may be entitled while in the actual service of the United States * * *." There is no similar requirement here with respect to those retained beyond their normal mandatory retirement date because of pending court-martial charges. Moreover, this Court expressly declined to decide in *Bell* whether "the Secretary of the Army was wholly without power under the statute to determine administratively that the petitioners after their capture were no longer in active service" (366 U.S. at 412). In the present case, the Army's determination that the time spent by petitioner in military confinement cannot be credited as active service for retirement purposes is consistent with the decisions of the Court of Claims and Comptroller General cited in the text.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
IRVING JAFFE,
Acting Assistant Attorney General.
ROBERT E. KOPP,
ANTHONY J. STEINMEYER,
Attorneys.

OCTOBER 1973.